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2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

5 MITZI L.,

6 Plaintiff,

7 v.

8 COMMISSIONER OF SOCIAL  
SECURITY,

9 Defendant.  
10

Case No. 3:18-5370 TLF

OPINION AND ORDER TO AFFIRM  
THE COMMISSIONER’S DECISION  
TO DENY DISABILITY BENEFITS

11 Plaintiff brought this matter for judicial review of the Commissioner’s denial of her  
12 application for supplemental security income (“SSI”) and disability insurance (“DBI”) benefits.  
13 Plaintiff contends the decision of the Commissioner was based on legal error and not supported  
14 by substantial evidence. For the reasons set forth below, the decision to deny benefits is affirmed.

15 FACTUAL AND PROCEDURAL HISTORY

16 On October 28, 2014, plaintiff filed for SSI and DIB, alleging disability beginning  
17 November 1, 2012. Administrative Record (“AR”) 20. These claims were denied on initial  
18 administrative review and on reconsideration. *Id.* Plaintiff appeared and testified at a hearing  
19 before administrative law judge (“ALJ”) Ilene Sloan on July 27, 2016. AR 45. Following the  
20 hearing, the ALJ issued an unfavorable decision on October 27, 2016. AR 20-37.

21 The Commissioner employs a five-step sequential disability evaluation process in  
22 determining whether a claimant is disabled. 20 C.F.R. § 416.920. If the claimant is found  
23 disabled or not disabled at any step thereof, the disability determination is made at that step, and  
24

1 the sequential evaluation process ends. *Id.* Step one considers whether the claimant is engaged in  
2 “substantial gainful activity.” *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013) (citing  
3 C.F.R. § 416.920(a)(4)). Step two considers “the severity of the claimant’s impairments. *Id.* If  
4 the claimant is found to have a severe impairment, step three considers “whether the claimant’s  
5 impairment or combination of impairments meets or equals a listing under 20 C.F.R. pt. 404,  
6 subpt. P, app. 1.” *Id.* “If so, the claimant is considered disabled and benefits are awarded, ending  
7 the inquiry.” *Id.* If not, the claimant’s residual functional capacity (“RFC”) is considered at step  
8 four in determining whether the claimant can still do his or her past relevant work and, if  
9 necessary, at step five “make an adjustment to other work.” *Id.*

10 At step one, the ALJ determined plaintiff had not engaged in substantial gainful activity  
11 since plaintiff’s alleged onset date of November 1, 2012. AR 22. At step two, the ALJ found  
12 plaintiff has the following severe impairments: status post thyroid/parathyroid surgeries; status  
13 post thyroid cancer; status post elbow and hand procedures; obesity; and fibromyalgia. AR 23.  
14 At step three, the ALJ found plaintiff did not have an impairment or combination of impairments  
15 that met or medically equaled the severity of one of the listed impairments. AR 26.

16 Prior to step four, the ALJ determined plaintiff has the RFC to perform light work  
17 “except she can only occasionally stoop, kneel, crouch, and crawl. She can occasionally climb  
18 ramps and stairs, but cannot climb ladders, ropes, or scaffolds. She would need to avoid  
19 concentrated exposure to hazards such as moving machinery and unprotected heights. She can  
20 frequently handle and finger with both upper extremities, and can frequently reach in all  
21 directions.” AR 26-27. After determining plaintiff’s RFC, the ALJ found at step four she was  
22 unable to perform any of her past relevant work, but that at step five she could perform other  
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1 jobs existing in significant numbers in the national economy, and therefore found plaintiff was  
2 not disabled. AR 35-36.

3 Plaintiff requested review and the Social Security Administration Appeals Council denied  
4 review on March 12, 2018, making the ALJ's decision the Commissioner's final decision subject  
5 to judicial review. AR 1. Plaintiff appealed to this Court on May 9, 2018. *See* Dkt. 4 p. 4. The  
6 Parties consented to proceed before a magistrate judge. Dkt. 2.

### 7 DISCUSSION

8 Plaintiff seeks reversal of the ALJ's decision and remand for an award of benefits,  
9 arguing the Commissioner erred in: evaluating (1) plaintiff's severe impairments; (2) plaintiff's  
10 symptom testimony; (3) plaintiff's RFC; and (4) whether plaintiff can perform work existing in  
11 substantial numbers in the national economy.

12 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal error;  
13 or (2) the decision is not supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648,  
14 654 (9th Cir. 2017). Substantial evidence is "such relevant evidence as a reasonable mind might  
15 accept as adequate to support a conclusion." *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir.  
16 2017) (quoting *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.  
17 1988)). This requires "more than a mere scintilla," though "less than a preponderance" of the  
18 evidence. *Id.* (quoting *Desrosiers*, 846 F.2d at 576). The Commissioner's findings will be upheld  
19 "if supported by inferences reasonably drawn from the record." *Batson v. Comm'r of Soc. Sec.*  
20 *Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).

21 If more than one rational interpretation can be drawn from the evidence, then the Court  
22 must uphold the ALJ's interpretation. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). That is,  
23 "[w]here there is conflicting evidence sufficient to support either outcome," the Court "must  
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1 affirm the decision actually made.” *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (quoting  
2 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)). The Court, however, may not affirm by  
3 locating a quantum of supporting evidence and ignoring the non-supporting evidence. *Orn*, 495  
4 F.3d at 630.

5 **1. Whether the ALJ appropriately evaluated plaintiff’s severe impairments.**

6 Plaintiff contends the ALJ’s step-two determination of plaintiff’s severe impairments  
7 does not account for her severe impairment of “status post mid foot fusion.” Dkt. 15 p. 5.

8 Step-two of the administration’s evaluation process requires the ALJ to determine if the  
9 claimant “has a medically severe impairment or combination of impairments.” *Smolen v. Chater*,  
10 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citation omitted). An impairment is "not severe" if it does  
11 not "significantly limit" the ability to conduct basic work activities. *Id.* “An impairment or  
12 combination of impairments can be found ‘not severe’ only if the evidence establishes a slight  
13 abnormality that has ‘no more than a minimal effect on an individual[’]s ability to work.’”  
14 *Smolen, supra*, 80 F.3d at 1290 (quoting Social Security Ruling “SSR” 85-28) (citing *Yuckert v.*  
15 *Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)). The step-two analysis is “a de minimis screening  
16 device to dispose of groundless claims” when the disability evaluation process ends at step two.  
17 *Smolen, supra*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)). Plaintiff  
18 bears the burden to establish by a preponderance of the evidence the existence of a severe  
19 impairment that prevented performance of substantial gainful activity and that this impairment  
20 lasted, or is expected to last, for at least twelve continuous months. *Yuckert, supra*, 482 U.S. at  
21 146.

22 In this case, medical records show plaintiff fractured her foot in late 2011 and in  
23 December 2012, she was diagnosed with posttraumatic arthritis in the left foot and underwent  
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1 mid-foot fusion surgery. AR 3914, 3894-3896. In July of 2013, plaintiff reported continuing  
2 lateral foot pain. AR 3641. Her physician performed a bone scan and stated he was “a bit at a  
3 loss as to why she continues to have her lateral foot pain, other than this is tendon related and  
4 related to the biomechanics of her foot.” *Id.* In August and November of 2013, plaintiff’s  
5 surgeon removed the retained hardware from plaintiff’s foot. AR 3621 and 3637.

6 The ALJ noted subsequent reports show few specific complaints related to left foot  
7 problems, which supports a finding that plaintiff’s foot condition is not severe. *See* AR 25.  
8 Plaintiff counters with citations to an April 2014 visit in which she sought treatment for chronic  
9 foot pain and a November 2014 assessment of lower extremity muscle spasms and bilateral leg  
10 pain. Dkt. 15 p. 6. But the ALJ reasonably discounted plaintiff’s April 2014 report of chronic  
11 foot pain because it was made in the context of requesting narcotic pain medication. AR 25; *see*  
12 AR 3516. As discussed below, doctors have noted plaintiff’s consistent pattern of being less than  
13 candid with her symptoms to obtain narcotic pain medication. *See* Section 3, *infra*. Furthermore,  
14 it is not evident plaintiff’s November 2014 muscle spasms and leg pain relate to her left foot  
15 condition. *See* AR 1235-1243.

16 The paucity of complaints related to a foot condition is consistent with plaintiff’s  
17 testimony at the hearing. Plaintiff made no specific mention of limitations due to foot problems.  
18 *See* AR 45-66. Moreover, as the ALJ implied, plaintiff’s activities do not suggest limitations  
19 from foot pain. *See* AR 34. Plaintiff took care of her terminally ill mother for roughly a year and  
20 a half from March 2013 to September 2014. *See* AR 60, 295. Plaintiff’s duties included helping  
21 her mother with eating, toileting, and dressing. AR 60. She also cared for the family’s horses,  
22 which she apparently continued to do after her mother passed away. *See* AR 297. These duties  
23 generally show ability to work on one’s feet.

1 In sum, while plaintiff underwent a foot procedure in 2012, the paucity of subsequent  
2 complaints related to foot pain suggest her condition resolved. Her activities also tend to suggest  
3 any continuing foot impairment has “no more than a minimal effect on [her] ability to work.”  
4 *See Smolen, supra*, 80 F.3d at 1290. Therefore, substantial evidence supports the ALJ’s  
5 determination that plaintiff’s left foot condition is not a severe impairment.

6 **2. Whether the ALJ appropriately concluded plaintiff did not meet one of the**  
7 **listings.**

8 Plaintiff broadly disputes the ALJ’s determination that her impairments did not meet or  
9 equal one of the listings. Dkt. 15 p. 4. However, “a bare assertion of an issue does not preserve a  
10 claim.” *D.A.R.E. America v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir.2001) (internal  
11 citations omitted). Plaintiff fails to identify a legal standard with respect to the listings and does  
12 not provide any reasoning how the ALJ erred with respect to the listing analysis. See *id.* pp. 1-  
13 12. Therefore, the court concludes the ALJ did not err in finding plaintiff’s impairments did not  
14 meet or medically equal any of the listings. See *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d  
15 1155, 1161 n.2 (9th Cir. 2008) (the court will not consider an issue that a plaintiff fails to argue  
16 “with any specificity in his briefing”).

17 **3. Whether the ALJ appropriately evaluated plaintiff’s symptom testimony.**

18 Plaintiff contends the ALJ did not provide legally sufficient reasons to discount her  
19 symptom testimony. The Court does not agree.

20 To reject a claimant’s subjective complaints, the ALJ must provide “specific, cogent  
21 reasons for the disbelief.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (citation omitted).  
22 The ALJ “must identify what testimony is not credible and what evidence undermines the  
23 claimant’s complaints.” *Id.*; see also *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless  
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1 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the  
2 claimant's testimony must be "clear and convincing." *Lester*, 81 F.3d at 834 (citation omitted).

3 Here, plaintiff testified that her inability to keep a schedule is the primary issue  
4 preventing her from working full time. AR 52. Plaintiff testified that she lost her thyroid and  
5 parathyroid glands, which causes problems regulating the levels of potassium and calcium in her  
6 body. AR 59. When her calcium levels are too low, plaintiff allegedly experiences paralytic  
7 contractions all over her body. When her calcium levels are too high, plaintiff allegedly  
8 experiences excruciating pain in her bones. AR 54. She claims that if she is too low on potassium  
9 it affects her cardiac and muscle functions. However, plaintiff stated that she is allergic to oral  
10 potassium and calcium, so she must go to the hospital "two or three days every week" to get  
11 electrolytes through a port in her chest. AR 51-53. Sweating and any exercise allegedly cause her  
12 to lose her reserves of calcium and potassium. AR 59.

13 Plaintiff testified that her other symptoms are constant fatigue and chronic vertigo. AR  
14 55, 64. For example, she alleged "a lot of times" she is too fatigued to walk across the room. AR  
15 62. Plaintiff denied being able to lift or carry "things." AR 63. Plaintiff claimed as of the day of  
16 the hearing, she could walk for 100 feet before needing to stop, and only 4 or 5 feet before  
17 needing rest if she goes up any kind of incline. AR 62-63. She claimed her medications make her  
18 feel "wired," and she only sleeps three or four hours a night, which affects her concentration. AR  
19 55.

20 Plaintiff also allegedly suffers from kidney stones, heart arrhythmia, and migraines. AR  
21 62. She claimed she cannot type because of nerve damage in her hands, and that it is hard to do  
22 anything repetitive with her wrists. AR 65. She also claimed problems in her thumbs and elbows.

1 However, although she allegedly continues to have a weak grip in her left hand, she noted  
2 surgeries to her right elbow and left thumb have “helped a lot as far as functionality.” AR 58.

3 Plaintiff claimed she did intermittent work as an independent massage therapist up until  
4 May of 2016. A large dose of radiation treatment she received in March 2016 allegedly  
5 exacerbated her heart problems and wrecked her salivary glands, which caused her to stop  
6 consistently working, although she acknowledged she continued to “pick up one massage here  
7 and there[.]” AR 51-52.

8 The ALJ found plaintiff’s medically determinable impairments could reasonably be  
9 expected to cause some of the alleged symptoms; however, plaintiff’s statements concerning the  
10 intensity, persistence, and limiting effects of these symptoms were not entirely consistent with  
11 the record. AR 27-28. The ALJ discounted plaintiff’s testimony because the record showed drug-  
12 seeking behavior, which gave reason to doubt plaintiff’s symptoms were as severe as she  
13 presented to her physicians; and her activities showed significantly greater functionality than she  
14 alleged. AR 28-35.

15 A. Medical Evidence/Drug Seeking Behavior

16 The ALJ found it reasonable that plaintiff would have at least some symptoms due to her  
17 thyroid and parathyroid conditions. AR 28. The ALJ noted evidence plaintiff would be  
18 permanently hypocalcemic (have low calcium) due to a loss of her thyroid glands and  
19 hypoparathyroidism. *Id.* The ALJ also recognized that symptoms of hypocalcemia could include  
20 muscle pain and cramping and irregular heartbeat with dizziness. *Id.* However, the ALJ found  
21 plaintiff’s medical evaluations indicated the objective findings and plaintiff’s presentation were  
22 not consistent with her alleged limitations, and doctors frequently concluded that plaintiff’s  
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1 reported symptoms were associated with drug seeking activity. See AR 29-33. The ALJ  
2 discussed a consistent pattern of drug seeking activity, including the following examples.

3 In August 2014, plaintiff presented to the emergency room with complaints of leg, arm,  
4 and abdominal pain. Treatment notes document that plaintiff demanded “Valium, Benadryl for  
5 any medication, and doses of dilaudid and morphine every 20 minutes.” AR 3418. Treatment  
6 providers noted plaintiff was “manipulative”—she stated she would allow her blood to be drawn  
7 only if she received the medication she was demanding. AR 3419. Plaintiff’s requests were  
8 denied, and she walked out angrily from the emergency room. AR 3419.

9 In September 2014, plaintiff assured treatment providers she was not driving, and  
10 plaintiff was administered narcotic pain medication. AR 3398. However, plaintiff was then seen  
11 driving herself away from the hospital. Treatment providers noted plaintiff “clearly  
12 misrepresented information in order to obtain sedating/narcotic medicines from UC. This  
13 presentation is c/w drug seeking behavior—acute on [sic] chronic.” *Id.* The treatment provider  
14 further noted “pt’s stated symptoms do not correlate clinically with his her physical appearance,  
15 physical exam, vital signs, and many prior lab studies. Pt has no visible indicators of pain or  
16 distress, is resting comfortably, NAD, VSS. Pt ambulates easily with steady gait.” *Id.*

17 Plaintiff’s medical record contains an additional note on “drug-seeking behavior,” which  
18 states: “patient presents to UC and ERs multiple times despite recent normal lab values. Patient  
19 has stated that her plan of care must include port access, Benadryl, IV Phenergan, IV narcotics  
20 and IV benzodiazepines. [P]atient becomes irate and belligerent when denied any of these. . . .”  
21 AR 1348.

22 On October 29, 2014, John Campbell M.D. noted Plaintiff had 18 visits in approximately  
23 2 and a half months and he was concerned Plaintiff was doctor shopping. AR 1115. Dr.

1 Campbell further noted “several times in the past . . . her symptoms only seem to be way out of  
2 proportion to the abnormalities in her lab work. I was also concerned that I reviewed her  
3 inpatient records and the inpatient physicians were concerned that she is getting secondary gain,  
4 and suspecting benzodiazepine abuse and dependence.” *Id.* In November 2014, Plaintiff again  
5 presented to the emergency room requesting pain medication. AR 1164. According to a nurse,  
6 plaintiff was lying calm and motionless when observed from afar but began rocking back and  
7 forth the moment the nurse walked into the room. *Id.* According to the nurse, plaintiff left upset  
8 that she did not receive any narcotics. *Id.*

9 In 2016, plaintiff’s longtime treatment providers with Franciscan Health noted plaintiff  
10 had 56 emergency room visits in the past year, and many more urgent care visits. They  
11 concluded her complaints of pain were a component of drug seeking. They indicated that she was  
12 manipulative and that, in the future, “[h]ospital admission should be only be considered in the  
13 future if there is a “clear indication.” AR 2514.

14 Plaintiff argues the numerous severe impairments the ALJ found at step two of the  
15 analysis contradict the little weight the ALJ gave her symptom testimony. But the step two  
16 analysis merely establishes whether or not a medically determinable impairment caused more  
17 than a minimal effect on a plaintiff’s ability to work. *See Smolen, supra*, 80 F.3d at 1290. Thus,  
18 positive findings at step two do not necessarily require an ALJ to adopt the full extent of  
19 limitations a plaintiff alleges are the result of her severe impairments.

20 Plaintiff next argues the alleged exaggeration of symptoms is not a good reason to  
21 disregard her testimony, because Plaintiff’s fibromyalgia—allegedly undiagnosed until 2015—  
22 explains her frequent claims of pain and discomfort and need for medication. Undiagnosed  
23 fibromyalgia, however, does not explain the less than candid behavior noted in plaintiff’s  
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1 treatment record—for example, the report that Plaintiff was lying calm and motionless when  
2 observed from afar but began rocking back and forth the moment the provider walked into the  
3 room. AR 1164.

4 Although on some occasions doctors found Plaintiff was indeed hypocalcemic, e.g. AR  
5 985, her less than candid behavior, the concerns about drug seeking, and the frequency her  
6 claims were unsubstantiated are legally sufficient reasons to doubt Plaintiff’s symptoms are as  
7 disabling as she claims. *See Mohammad v. Colvin*, 595 F. App’x 696, 697 (9th Cir. 2014)  
8 (“Evidence of malingering is . . . sufficient to support a negative credibility finding . . .”)

9 B. Activities

10 The ALJ found Plaintiff’s activities were mostly inconsistent with the disabling  
11 symptoms Plaintiff alleged. AR 34-35. Plaintiff’s activities, as discussed by the ALJ, included  
12 caring for her terminally ill mother, working with horses daily, and doing intermittent work as an  
13 independent massage therapist. *Id.* Plaintiff cared for her terminally ill mother 24 hours a day for  
14 roughly a year and a half until her mother passed away in September 2014; and her duties  
15 included helping her mother with eating, toileting, and dressing. *See* AR 60, 295. She also cared  
16 for the family’s horses, which she apparently continued to do after her mother passed away. *See*  
17 AR 297. The ALJ cited the following examples of Plaintiff’s activities. *See* AR 34.

18 In July of 2013, the Plaintiff indicated she continued to take care of her mother, get  
19 around in the barn, and take care of the horses. AR 3641 and 3642. In April 2014, Plaintiff stated  
20 that she cares for her mother and looks after the horses, which “she really enjoys and keeps her  
21 active.” AR 3517. In a 2015 function report, Plaintiff noted that her mother had horses, and that  
22 she (the [Plaintiff]) was still feeding the horses daily. AR 297. In September of 2015, Plaintiff  
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1 told a treatment provider she was working with horses every day and preparing them for events.  
2 AR 1378. That same month, she told a treatment provider she cleans horse stalls daily. AR 2012.

3 The ALJ found Plaintiff's home care and horse duties consistent with the job of home  
4 attendant, which is a job at the medium exertional level. AR 34. Hence, the ALJ determined  
5 Plaintiff's ability to do these duties for one and a half years during the relevant period is  
6 "markedly inconsistent with her allegations, including her claims of incapacitating pain,  
7 dizziness, fatigue, and body shaking." *Id.*

8 The ALJ also noted evidence showing Plaintiff worked intermittently as a massage  
9 therapist during the period at issue.

10 For instance, In January 2015, Plaintiff told doctors that she could not wear a Holter  
11 monitor because she was working as a massage therapist and could not work while  
12 wearing the monitor. In September of 2015, [Plaintiff] told doctors she could not  
13 follow their order to reduce physical exertion prior to scheduled blood tests because  
14 she worked as a massage therapist. In February 2016, she indicated that she worked  
15 as a massage therapist. At the July 2016 hearing, she stated that she last did  
16 massages in May 2016.

17 AR 34 (citing AR 2012, 1392, 2518, 2522).

18 The ALJ found Plaintiff's work as a massage therapist not consistent with Plaintiff's  
19 allegations, including her claims of incapacitating pain, constant vertigo, dizziness, severe  
20 fatigue, and body shaking. The ALJ also noted the work of massage therapist is classified as a  
21 medium job, AR 35 (citing the VE's testimony at AR 68), and Plaintiff's ability to do this work  
22 intermittently suggests that she could do a less demanding light job on a consistent basis. AR 35.

23 The record supports the ALJ's discussion of Plaintiff's activities, and the Court agrees  
24 that her demonstrated ability to work as a massage therapist, provide full daily care to her  
25 mother, and provide daily care to large animals – horses -- shows a level of functioning that is  
inconsistent with her claims of disabling pain, constant vertigo, dizziness, and severe fatigue.

Hence, the evidence of plaintiff's activities is a clear and convincing reason to discount her symptom testimony. Therefore, the ALJ did not err in discounting Plaintiff's symptom testimony.

**4. Whether the ALJ appropriately evaluated Plaintiff's RFC**

Plaintiff contends the ALJ's RFC analysis is flawed because it does not account for limitations from her upper extremity conditions, low calcium levels, and fibromyalgia.

**A. Upper extremity conditions**

With respect to her upper extremity conditions, the ALJ assessed a limitation to frequent handling and fingering with both extremities. AR 27. Plaintiff argues her upper extremity conditions show that a limitation to frequent handling and fingering is inadequate. Dkt. 15 p. 8-9. Plaintiff notes that she has been diagnosed with various disorders of the elbows, fingers, and wrists, and has undergone several surgeries, including a dorsal compartment release in June 2010 and trigger thumb release in February 2013. *Id.* She also notes a June 2016 recommendation that she receive surgery on her right elbow. *Id.*

Plaintiff, however, does not provide any explanation how the conditions she lists require greater limitations than assessed in the RFC. See Dkt. 15 p. 8-9. She suggests the Court should interpret medical evidence differently than the ALJ did. But "[t]he trier of fact and not the reviewing court must resolve conflicts in the evidence, and if the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ." *Matney on Behalf of Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992).

Here, the ALJ reasonably concluded a limitation to frequent fingering and handling is sufficient to address Plaintiff's upper extremity limitations. The ALJ noted Plaintiff underwent various surgeries on her upper extremities from 2010 to 2013, the last of which were left thumb

1 trigger release in February of 2013 and right elbow surgery in November 2013. AR 32. However,  
2 the ALJ found both conditions resolved after surgery. *Id.* The ALJ relied on a report by  
3 orthopedist Clarence Fossier, M.D., who performed an independent medical examination on  
4 Plaintiff in July of 2014. *See id.* Dr. Fossier reviewed Plaintiff's medical record, and diagnosed  
5 medial epicondylitis in the right elbow, bilateral radial styloid tenosynovitis, left  
6 carpometacarpal strain, left trigger finger, and right ulnar nerve lesion. AR 889. Nevertheless,  
7 Dr. Fossier issued few significant restrictions in Plaintiff's functioning. *See* AR 896. Among his  
8 findings, Dr. Fossier reported Plaintiff could use her hands for repetitive tasks including simple  
9 grasping, pushing and pulling, and fine manipulating. AR 896. The ALJ gave this opinion  
10 significant weight. AR 35.

11         The ALJ found few subsequent reports showed any complaints or findings indicative of  
12 problems with upper extremities until March 2015, when Plaintiff reported that her right elbow  
13 and upper extremity symptoms had returned. AR 33. Plaintiff was "adamant" she not receive an  
14 injection for tendinitis and asked to be referred for surgery. AR 1370. However, the ALJ found  
15 Plaintiff's complaints and findings in March 2015 were not consistent with a rheumatology  
16 evaluation from a month prior, in which she displayed active full range of motion at her  
17 shoulders, elbows, and wrists, and 5/5 hand grip strength. AR 33 (citing AR 1378-79).

18         The ALJ also found Plaintiff's symptoms caused little functional restriction because she  
19 did not follow up in a timely way with the surgical referral from March 2015, and treatment  
20 notes from March 2015 through June 2016 showed few, if any specific complaints or findings  
21 indicative of abnormalities in the upper extremities. AR 33.

22         The ALJ noted Plaintiff did not follow up on the referral to surgery until June 2016, when  
23 Ghalib A. Hussein, M.D. indicated they would proceed with a right side "de Quervain's release"

1 procedure. AR 3051. However, the ALJ noted that Dr. Hussein did not record any examination  
2 findings to corroborate Plaintiff's report of her symptoms or to estimate the functional limitation  
3 from her reported symptoms. AR 33 (citing AR 3051). Thus, the ALJ determined clinical  
4 findings before and after Dr. Hussein's evaluation are the best gauge of Plaintiff's function. AR  
5 33.

6 As discussed above, the ALJ also reasonably found Plaintiff's activities suggested no  
7 greater limitations than those in the RFC and were inconsistent with her allegations. Considering  
8 Plaintiff's activities, Dr. Fossier's medical examination, and the medical record showing only  
9 sporadic complaints and findings related to an upper extremity condition, the ALJ reasonably  
10 concluded Plaintiff was capable of frequent handling and fingering in both extremities. Because  
11 the ALJ's conclusion was reasonable, the Court will not substitute its judgment for that of the  
12 ALJ. *See Matney*, 981 F.2d at 1019.

13 B. Low calcium levels and fibromyalgia

14 Plaintiff argues her symptoms of hypocalcemia—syncope, fatigue, muscle weakness,  
15 cramping, abdominal pain, kidney stones, and numbness—were not properly accounted for in the  
16 RFC. Dkt. 15 p. 10. She cites an April 2016 note by Hope Torregosa M.D., who stated  
17 “hypocalcemia from surgical hypoparathyroidism is very difficult to treat[. P]atients have very  
18 poor quality of life and she is essentially a very good example of how it is not to have any  
19 parathyroid glands.” AR 1611. Plaintiff adds that the limiting nature of her hypocalcemia, in  
20 conjunction with her fibromyalgia, limit her ability to lift and carry and concentrate and persist  
21 on a continual basis. Dkt. 15 p. 10.

1 As noted, “[t]he trier of fact and not the reviewing court must resolve conflicts in the  
2 evidence, and if evidence can support either outcome, the court may not substitute its judgment  
3 for that of the ALJ.” *Matney*, 981 F.2d at 1019.

4 Here, the ALJ acknowledged diagnoses of fibromyalgia and Dr. Torregosa’s note that  
5 hypocalcemia can lead to a poor quality of life. AR 24, 28. However, while Dr. Torregosa’s note  
6 suggests some problems from hypocalcemia, it does not describe what specific functional  
7 limitations Plaintiff would suffer due to her condition. *See* AR 1611.

8 Although the ALJ concluded hypocalcemia could cause the symptoms Plaintiff alleged,  
9 the ALJ reasonably determined Plaintiff’s specific symptoms were often not substantiated and  
10 her subjective complaints could not be credited because of the consistent pattern of drug-seeking  
11 behavior. *See* Section 3A, *supra*. Furthermore, the ALJ reasonably relied on evidence of  
12 Plaintiff’s activities to conclude Plaintiff’s symptoms of hypocalcemia and fibromyalgia do not  
13 prevent Plaintiff from performing the RFC. *See* Section 3B, *supra*.

14 Lastly, the ALJ gave significant weight to the March 2015 opinion by state agency  
15 consultant Norman Stanley, M.D., who reviewed Plaintiff’s medical file and recommended an  
16 RFC no more restrictive than what was assessed by the ALJ. *See* AR 115, 116. Thus, while the  
17 record could support somewhat greater limitations than assessed in the RFC, substantial evidence  
18 supports the ALJ’s RFC findings. Therefore, the ALJ did not err in determining Plaintiff’s RFC.

19 **5. Whether the ALJ appropriately determined Plaintiff can perform other work**  
20 **existing in substantial numbers in the national economy.**

21 Lastly, Plaintiff contends the ALJ’s step five determination was defective because the  
22 hypothetical presented to the VE did not include all the limitations in the RFC.



1 At the fifth and final stage of the disability determination process, the burden shifts to the  
2 Commissioner to prove that the Plaintiff can perform other work in the national economy, given  
3 her age, education, RFC, and past work experience. *See Bowen v. Yuckert*, 482 U.S. 137, 146 n.5  
4 (1987). “[T]o support a finding that [one is] not disabled at this fifth step of the sequential  
5 evaluation process, [the Commissioner is] responsible for providing evidence that demonstrates  
6 that other work exists in significant numbers in the national economy that [one] can do, given  
7 [the] [RFC] and vocational factors.” 20 C.F.R. § 404.1560(c)(2). “Without other reliable  
8 evidence of a claimant's ability to perform specific jobs, the Secretary must use a vocational  
9 expert to meet that burden. Hypothetical questions posed to the vocational expert must set out all  
10 the limitations and restrictions of the particular claimant.” *Magallanes v. Bowen*, 881 F.2d 747,  
11 756 (9th Cir. 1989) (citation omitted).

12 Here, the ALJ found plaintiff was disabled based on testimony from the VE that a person  
13 with plaintiff’s age, education, experience, and most of the limitations in the RFC could perform  
14 the work of “mail clerk, Dictionary of Occupational Titles [“DOT”] 209.687-026[.]” *See* AR 36,  
15 69. But as the Defendant concedes, plaintiff’s RFC includes a limitation to frequent handling and  
16 fingering, and this limitation was not included in the hypothetical presented to the VE. AR 26-  
17 27, 68. However, even if the ALJ erred in failing to convey plaintiff’s manipulative limitations to  
18 the VE, the ALJ’s failure to do so was harmless.

19 Harmless error principles apply in the Social Security context. *Molina v. Astrue*, 674 F.3d  
20 1104, 1115 (9th Cir. 2012). An error is harmless only if it is not prejudicial to the claimant or  
21 “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v. Comm’r Soc. Sec.*  
22 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. The determination  
23 as to whether an error is harmless requires a “case-specific application of judgment” by the  
24

1 reviewing court, based on an examination of the record made “‘without regard to errors’ that do  
2 not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at 1118-19 (quoting *Shinseki v.*  
3 *Sanders*, 556 U.S. 396, 407 (2009)).

4 Here, although the manipulative limitations in plaintiff’s RFC were not presented to the  
5 VE, this omission did not affect the ultimate disability determination because the ALJ found the  
6 Dictionary of Occupational Titles (the “DOT”) indicates the job of mail clerk requires no more  
7 than frequent handling and reaching. AR 36 note 3. The ALJ’s findings are consistent with the  
8 DOT entry for “mail clerk 209.687-026,” which requires no more than frequent reaching,  
9 handling, and fingering. *See* DICOT 209.687-026 *Mail Clerk* (1991), available at 1991 WL  
10 671813. Hence, even if the manipulative limitations in plaintiff’s RFC had been presented to the  
11 VE, the ultimate disability determination would have been the same. Therefore, even if the ALJ  
12 erred in failing to present the manipulative limitations in the RFC to the VE, the ALJ’s error was  
13 harmless.

#### 14 CONCLUSION

15 For the foregoing reasons, the decision of the Commissioner was based on substantial  
16 evidence. Therefore, the Commissioner’s decision is hereby AFFIRMED. JUDGMENT should  
17 be for DEFENDANT and the case should be closed.

18  
19 Dated this 3rd day of July, 2019.

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21  
22 

23 Theresa L. Fricke  
24 United States Magistrate Judge